IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S BENCH BRIEF REGARDING ADMISSIONS BY PARTY-OPPONENTS UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)

Plaintiff, the State of Oklahoma ("the State"), hereby submits this bench brief to assist the Court with its evidentiary rulings involving admissions by a party-opponent. Admissions by a party-opponent are not hearsay. Fed. R. Evid. 801(d)(2). The State expects this issue to arise not only during the next few days of trial, but also repeatedly throughout the trial, as the State seeks to introduce documents to which Defendants have lodged hearsay objections, but which qualify as non-hearsay under Fed. R. Evid. 801(d)(2).

Discussion

Federal Rule of Evidence 801 provides in relevant part:

> A statement is not hearsay if . . .
>
> The statement is offered against a party and is
>
> (A) the party's own statement, in either an individual or a representative capacity or
>
> (B) a statement of which the party has manifested an adoption or belief in its truth, or
>
> (C) a statement by a person authorized by the party to make a statement concerning the subject, or

> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
>
> The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Fed. R. Evid. 801(d)(2). The Rules call for "generous treatment of the avenue of admissibility" for admissions in general. Advisory Committee Notes to Fed. R. Evid. 801(d)(2); *Penguin Books v. New Christian Church*, 262 F. Supp. 2d 251, 258 (S.D.N.Y. 2003).

As is clear, Fed. R. Evid. 801(d)(2) contains five separate grounds for imputing a statement to a party. They are addressed in turn below.

(1) Party's Own Statement: FRE 801(d)(2)(A)

Fed. R. Evid. 801(d)(2)(A) provides that a statement is not hearsay if it is offered against a party and is the party's own statement. This is the most straightforward prong of Rule 801(d)(2) and requires little commentary at this time.

(2) Statement in Which a Party Has Manifested an Adoption or Belief in Its Truth: FRE 801(d)(2)(B)

Under this prong of Rule 801(d)(2) – sometimes called the "adoptive admission" prong – the proponent of the statement's admissibility must show that the party against whom the statement is offered adopted or acquiesced to the statement. *Penguin Books U.S.A., Inc.*, 262 F. Supp. 2d at 258. In this regard, "adoption or acquiescence may be manifested in any appropriate manner." Advisory Committee's Note to Fed. R. Evid. 801(d)(2)(B). "Adoption is evaluated by examining the behavior of the party it is to be offered against. Adoption of another's statement

can be manifest by any appropriate means, such as language, conduct or silence. A party may adopt a written statement by using it or taking action in response to or in compliance with it." *Id.* (citing Weinstein's Federal Evidence, § 801.31; *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 239 (2d Cir. 1999)).

As stated, "adoption by use" is one way courts describe conduct that constitutes evidence of an adoptive admission. *Penguin Books*, 262 F. Supp. 2d at 258 (citing *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1062 (W.D. Mo. 1985)). The Southern District of New York court stated:

> [U]se of a document supplied by another in fact represents the party's intended assertion of the truth therein, [and] an adoptive admission can be found, such as where a party forwards a document to another in response to some request for information contained in the document. [*White Indus.*, 611 F. Supp. at 1062.] Furthermore, even if the document is not expressly 'vouched for' by the party it must only be shown by implication that business was conducted in a fashion that the statement was adopted. . . . An entity's printing, publishing and dissemination of a document or a report that contains statements that pertain in some way to the organization or company can constitute an adoptive admission.

Penguin Books, 262 F. Supp. 2d at 259 (internal quotation marks omitted).

With these principles as background, the Tenth Circuit's decision in *Wagstaff v. Protective Apparel Corp of America, Inc.*, 760 F.2d 1074 (10th Cir. 1985), is particularly instructive. In *Wagstaff*, plaintiff's decedent – who had been a distributor of defendants – died allegedly due to a product defect during a demonstration of defendants' product. *Id.* at 1076. On appeal, the plaintiff claimed that the district court erred in refusing to admit into evidence certain reprints of newspaper articles delivered by defendants to plaintiff's decedent. *Id.* at 1078. The reprints made statements about defendants' financial situation that were claimed to be inflated representations relevant to a fraud inquiry. The district court had ruled that the reprints were inadmissible as hearsay. *Id.*

On appeal, the Tenth Circuit held that the district court abused its discretion in refusing to admit the reprints. *Id.* The Court reasoned that under Rule 801(d)(2), the reprints were not hearsay because they were offered against a party and were statements of which the opposing party manifested his adoption or belief in its truth. *Id.* "By reprinting the newspaper articles and distributing them to persons with whom defendants were doing business, defendants unequivocally manifested their adoption of the inflated statements made in the newspaper articles." *Id.* Thus, they were admissible under Rule 801(d)(2)(B).

By way of further example, in *Penguin Books*, the district court found that the dissemination and publication by the Foundation for Inner Peace, Inc. ("Foundation") of a book written by the Foundation's co-founder, vice-president and executive board member constituted an adoptive admission by the Foundation. 262 F. Supp. 2d at 258-60 (further stating in support that the book was offered in conjunction with the Foundation's stated purpose).

Relatedly, in *Buscemi v. Pepsico, Inc.*, 736 F. Supp. 1267, 1268 (S.D.N.Y. 1990), an employment discrimination case, the admissibility of (1) statements published in a *Business Month* magazine attributed to defendant's senior vice-president of personnel ("King") and (2) a letter by King in response to the article – was at issue. The court stated:

> As regards the *Business Month* article, there are two statements attributed to King which are at issue: 'We're looking for the most aggressive youngsters . . . .' and 'we don't want unpromotable fifty year-olds around. They become bitter and frustrated and are better off leaving.' . . . As a preliminary matter, any suggestion that the published statements and letter constitute inadmissible hearsay is without merit. ***The statements are quotations which constitute admissions by a party-opponent and were adopted by King in his subsequent letter to Business Month***. ***They are not hearsay***.

Id. at 1270-71 & n.3 (emphasis added).

And finally, as mentioned above, "manifestation of belief in the truth of a statement may occur by silence, that is a failure to respond when natural to do so. 30B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure, Evidence* § 7021 (Interm ed. 2002) ['Wright & Miller']. . . . [I]f the declarant and the party are engaged in such a relationship that the recipient of a written statement would have been expected to take issue with the contents if he or she disagreed with them, adoption may be established. Weinstein, [*supra*] § 801.31 at 801-51; *In re Columbia Sec. Litig.*, 155 F.R.D. 466, 478 (S.D.N.Y. 1994) (holding that acquiring corporation's fraudulent statements in newspaper articles, that it took no action to deny or correct, constituted adoptive admissions)." *Penguin Books*, 262 F. Supp. 2d at 259.

(3) Statement by Person Authorized by a Party To Make a Statement Regarding the Subject: FRE 801(d)(2)(C)

Fed. R. Evid. 801(d)(2)(C) provides that a statement by a person authorized by the party to make a statement constitutes an admission of the party. In brief, speaking authority can be granted either implicitly or explicitly. *Penguin Books*, 262 F. Supp. 2d at 260. And courts generally require that a person making the statement be an agent of the party-opponent against whom the admission is being offered. *Id.* (citing Wright & Miller, *supra* § 7022).

(4) Statement by Party's Agent or Employee Concerning Matter Within Scope of Her Agency or Employment: FRE 801(d)(2)(D)

Rule 801(d)(2)(D) provides that a statement is not hearsay if "the statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment . . ." Fed. R. Evid. 801(d)(2)(D). Such admissions may be in the form of publications. *See, e.g.*, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81, 91 n.7 (N.D. Ill. 1979) ("Plaintiffs, in addition to the evidence regarding Martino's franchise, have submitted as an exhibit Mr. Ray Kroc's book, *Grinding It Out: The Making of McDonald's*. The

statements in this book will be admissible against defendants as admissions under Rule 801(d)(2)(D).").

The case law supports a broad reading of the Rule. *B.H. v. Johnson*, 128 F.R.D. 659, 662 (N.D. Ill. 1989). As stated by the Seventh Circuit Court of Appeals, "Rule 801(d)(2)(D) takes the broader view that an agent or servant who speaks on any matter within the scope of his agency or employment during the existence of that relationship, is unlikely to make statements damaging to his principal or employer unless those statements are true." *Nekolny v. Painter*, 653 F.2d 1164, 1172 (7th Cir. 1981). In contrast to Rule 801(d)(2)(C), subdivision (D) only requires that the employee/agent made the statement within the scope of employment. *See Precision Piping & Instruments, Inc. v. E.I. DuPont deNemours & Co.*, 951 F.2d 613, 619 (4th Cir. 1991); *Penguin Books*, 262 F. Supp. 2d at 260 ("statements by company officers within the realm of that officer's responsibility and during the existence of the relationship constitute an admission by the employer"); *id.* ("the individual only had to have general authority of the business area the contract falls under"); *SEC v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395, 2000 WL 968010, at *16 (S.D.N.Y. July 3, 2000) (letter by president of company on company letterhead constituted company admission). Thus, in *Seashock v. Harris Corp.*, No. 88-2067, 1989 U.S. Dist. LEXIS 3725 (E.D. Pa. Apr. 11, 1989), the court admitted an article as a non-hearsay party admission on the simple ground that it was written by a manager of the defendant. *Id.* at *4 ("Mr. McConnaughey was manager of [a defendant] at the time he authored the article . . . . Therefore, under Rule 801, the publication is admissible as an admission by a party opponent.").

(5) <u>Statements by co-conspirators: FRE 801(d)(2)(E)</u>

This subdivision requires no discussion at this time.

* * *

In addition to the principles set forth above with respect to the particular prongs of Rule 801(d)(2), it is worth noting as a general matter that pursuant to Rule 801(d)(2), an admission by a party opponent does not require that the statement be an admission of liability. *United States v. Reed*, 227 F.3d 763, 770 (7th Cir. 2000) ("statements need neither be incriminating, inculpatory, against interest nor otherwise inherently damaging to the declarant's case"); *see also Case & Protection of Sophie*, 449 Mass. 100, 110 n.14 (2007) ("There is no requirement of admissibility that the statement of a party opponent be contradictory or against his own interest.").

Respectfully Submitted,

W.A. Drew Edmondson OBA #2628
ATTORNEY GENERAL
Kelly H. Foster OBA #17067
ASSISTANT ATTORNEY GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA #18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street, Suite 707
Tulsa, OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

/s/ Ingrid L. Moll
William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
Mathew P. Jasinski
(admitted *pro hac vice*)
MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
(admitted *pro hac vice)*
MOTLEY RICE LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	Fc_docket@oag.ok.gov
Kelly H. Foster, Assistant Attorney General	kelly_foster@oag.ok.gov
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE LLC	
Counsel for State of Oklahoma	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.	
John H. Tucker	jtucker@rhodesokla.com

Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee “Buddy” Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmpc.com
Randall E. Rose	rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.	
Counsel for George’s Inc. & George’s Farms, Inc.	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
Counsel for Peterson Farms, Inc.	

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
Counsel for Simmons Foods, Inc.	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
Counsel for Willow Brook Foods, Inc.	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	

Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
Counsel for US Chamber of Commerce and American Tort Reform Association	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
Counsel for Oklahoma Farm Bureau, Inc.	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
Counsel for State of Arkansas and Arkansas National Resources Commission	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net

FRIDAY, ELDREDGE & CLARK, LLP	
Counsel for Arkansas Farm Bureau Federation	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
Counsel for American Farm Bureau and National Cattlemen's Beef Association	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research	
Diane Hammons	Diane-Hammons@cherokee.org
Sara Hill	Sarah-Hill@cherokee.org
Counsel for the Cherokee Nation	

/s/ Ingrid L. Moll
Ingrid L. Moll